Supreme Court U.S.
FILED
FEB 10 2015
OFFICE OF THE CLERK

14-990
No.

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA
Petitioners,

v.

BOBBIE S. MACK AND LINDA H. LAMONE,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
JEFFREY S. REDFERN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127
mkimberly@mayerbrown.com

Counsel for Petitioners

QUESTION PRESENTED

The Three-Judge Court Act requires the convening of three-judge district courts to hear a wide range of particularly important lawsuits, including constitutional challenges to the apportionment of congressional districts and certain actions under the Voting Rights Act, Bipartisan Campaign Reform Act, Prison Litigation Reform Act, and Communications Act. The Three-Judge Court Act provides that a three-judge court shall be convened to hear such cases unless the single judge to whom the case is initially referred "determines that three judges are not required." 28 U.S.C. § 2284(a), (b)(1).

In *Goosby* v. *Osser*, 409 U.S. 512 (1973), this Court held that the Three-Judge Court Act "does not require the convening of a three-judge court when the [claim] is insubstantial." *Id.* at 518. A claim is insubstantial "for this purpose" if it is "'obviously frivolous,'" "'essentially fictitious,'" or "inescapably * * * foreclose[d]" by this Court's precedents. *Ibid.*

The question presented, which has divided the lower courts, is as follows:

May a single-judge district court determine that a complaint covered by 28 U.S.C. § 2284 is insubstantial, and that three judges therefore are not required, not because it concludes that the complaint is wholly frivolous, but because it concludes that the complaint fails to state a claim under Rule 12(b)(6)?

TABLE OF CONTENTS

Question Presented i
Table of Authorities iii
Opinions Below 1
Jurisdiction 1
Statutory Provision Involved 1
Statement 3
A. Statutory background 4
B. Factual background 6
C. Procedural background 8
Reasons for Granting the Petition 10
A. *Duckworth* conflicts with this Court's precedents 10
B. *Duckworth* conflicts with the holdings of other courts of appeals 14
C. The question presented is important 18
D. Petitioners' First Amendment claim is not obviously frivolous 26
Conclusion 30
Appendix A — Court of appeals opinion 1a
Appendix B — District court opinion 3a
Appendix C — Order denying rehearing 22a
Appendix D — Redistricting map 23a

TABLE OF AUTHORITIES

Cases

Ala. Leg. Black Caucus v. *Alabama*,
988 F. Supp. 2d 1285
(M.D. Ala. 2013) 18, 24

Allen v. *State Bd. of Elections*,
393 U.S. 544 (1969) 22

Anderson v. *Celebrezze*,
460 U.S. 780 (1983) 28

Anne Arundel Cty. Republican Cent. Cent. Comm. v. *State Admin. Bd. of Elections*,
781 F. Supp. 394 (D. Md. 1991) 29

Ariz. State Leg. v. *Ariz. Indep. Redistricting Comm'n*, 2013 WL 4177067
(D. Ariz. Aug. 14, 2013) 23

Arizona State Leg. v. *Arizona Indep. Redistricting Comm'n*,
997 F. Supp. 2d 1047 (D. Ariz. 2014) 18, 23

Backus v. *South Carolina*,
857 F Supp. 2d 553 (D.S.C.) 19

Bailey v. Patterson,
369 U.S. 31 (1962) 18

Baldus v. *Members of Wis. Gov't Accountability Bd.*,
849 F. Supp. 2d 840 (E.D. Wis. 2012) 19

Bell v. *Hood*,
327 U.S. 678 (1946) 12

Bovee v. *Broom*,
732 F.3d 743 (7th Cir. 2013) 17

Cases—continued

Brown v. *Ky. Leg. Research Comm'n*,
966 F Supp. 2d 709 (E.D. Ky. 2013) 18

Brown v. *Plata*,
131 S. Ct. 1910 (2011) 21

Butler v. *City of Columbia*,
2010 WL 1372299 (D.S.C. Apr. 5, 2010) 19

Cal. Democratic Party v. *Jones*,
530 U.S. 567 (2000) 27

Carter v. *Va. State Bd. of Elections*,
2011 WL 1637942
(W.D. Va. Apr. 29, 2011) 20

Citizens United v. *FEC*,
558 U.S. 310 (2010) 20

City of Kings Mountain v. *Holder*,
746 F. Supp. 2d 46 (D.D.C. 2010) 19

Clements v. *Fashing*,
457 U.S. 957 (1982) 28, 29

Clemons v. *U.S. Dep't of Commerce*,
710 F. Supp. 2d 570 (N.D. Miss.) 19

Coleman v. *Brown*,
952 F. Supp. 2d 901 (E.D. Cal. 2013) 21

Coleman v. *Schwarzenegger*,
922 F. Supp. 2d 882 (E.D. Cal. 2009) 21

Desena v. *Maine*,
793 F. Supp. 2d 456 (D. Me. 2011) 19

Duckworth v. *State Administration Board of Election Laws*,
332 F.3d 769 (2003) ..... *passim*

Cases—continued

Duckworth v. *State Bd. of Elections*,
213 F. Supp. 2d 543 (D. Md. 2002) 29

Elrod v. *Burns*,
427 U.S. 347 (1976) 27

Essex v. *Kobach*,
874 F Supp. 2d 1069 (D. Kan. 2012) 19

Evenwel v. *Perry*,
2014 WL 5780507 (W.D. Tex. Nov. 5, 2014) 18

Favors v. *Cuomo*,
2012 WL 928223 (E.D.N.Y. Mar. 19, 2012) 19

FEC v. *National Conservative Political Action Committee*,
470 U.S. 480 (1985) 21

Fletcher v. *Lamone*,
831 F. Supp. 2d 887 (D. Md. 2011) 7, 11, 19

Garcia v. *2011 Legislative Reapportionment Com'n*,
559 F. App'x 128 (3d Cir. 2014) 20

Garcia v. *2011 Legislative Reapportionment Com'n*,
938 F Supp. 2d 542 (E.D. Pa. 2013) 20

Gonzalez v. *Auto. Emps. Credit Union*,
419 U.S. 90 (1974) 5, 6, 13

Goosby v. *Osser*,
409 U.S. 512 (1973) ..... *passim*

Gorrell v. *O'Malley*,
2012 WL 226919 (D. Md. Jan. 19, 2012) 20

Cases—continued

Hagans v. *Lavine*,
415 U.S. 528 (1974) 12, 17

Harris v. *Arizona Indep. Redistricting Comm'n*,
993 F. Supp. 2d 1042 (D. Ariz. 2014) 18, 24

Idlewild Bon Voyage Liquor Corp. v. *Epstein*,
370 U.S. 713 (1962) 6, 13, 14

James v. *FEC*,
914 F. Supp. 2d 1 (D.D.C. 2012) 19

Jefferson Cnty. Comm'n v. *Tennant*,
876 F. Supp. 2d 682 (S.D. W. Va.) 19

Kalson v. *Paterson*,
542 F.3d 281 (2d Cir. 2008) 5, 18

Kostick v. *Nago*,
960 F. Supp. 2d 1074 (D. Haw. 2013) 18

Lake Carriers' Ass'n v. *MacMullan*,
406 U.S. 498 (1972) 29

LaRouche v. *Fowler*,
152 F.3d 974 (D.C. Cir. 1998) ..... *passim*

League of United Latin American Citizens v. *Perry*,
548 U.S. 399 (2006) 20

Little v. *Strange*,
796 F. Supp. 2d 1314 (M.D. Ala. 2011) 19

Lubin v. *Panish*,
415 U.S. 709 (1974) 28

Cases—continued

LULAC of Texas v. *Texas*,
113 F.3d 53 (5th Cir. 1997) 16, 17

Marks v. *United States*,
430 U.S. 188 (1977) 27

McConnell v. *FEC*,
540 U.S. 93 (2003) 21

McCutcheon v. *FEC*,
134 S. Ct. 1434 (2014) 20, 21

McCutcheon v. *FEC*,
893 F. Supp. 2d 133 (D.D.C. 2012) 19

McLucas v. *DeChamplain*,
421 U.S. 21 (1975) 5, 12

Mi Familia Vota Educ. Fund v. *Detzner*,
891 F. Supp. 2d 1326 (M.D. Fla. 2012) 19

NAACP v. *Snyder*,
879 F. Supp. 2d 662 (E.D. Mich. 2012) 19

Nat'l Interfaith Cable Coal., Inc. v. *FCC*,
512 U.S. 1230 (1994) 21

Neitzke v. *Williams*,
490 U.S. 319 (1989) 12

New Hampshire v. *Holder*,
293 F.R.D. 1 (D.D.C. 2013) 19

Olson v. O'Malley,
2012 WL 764421 (D. Md. Mar. 6, 2012) 20

Page v. *Bartels*,
248 F.3d 175 (3d Cir. 2001) ..... *passim*

Page v. *Va. State Bd. of Elections*,
15 F. Supp. 3d 657 (E.D. Va. 2014) 19

Cases—continued

Perez v. *Texas*,
970 F. Supp. 2d 593 (W.D. Tex. 2013) 18

Perry v. *Perez*,
132 S. Ct. 934 (2012) 20

Petteway v. *Henry*,
2011 WL 6148674 (S.D. Tex. 2011) 19, 24

Phillips v. *United States*,
312 U.S. 246 (1941) 24

Reynolds v. *Sims*,
377 U.S. 533 (1964) 9

Rufer v. *FEC*,
2014 WL 4076053 (D.D.C. 2014) 21

Schonberg v. *FEC*,
792 F Supp. 2d 14 (D.D.C. 2011)
(per curiam) 19

Smith v. *Hosemann*,
852 F. Supp. 2d 757 (S.D. Miss. 2011) 19

Somers v. *S.C. State Election Comm'n*,
871 F Supp. 2d 490 (D.S.C. 2012) 19

Stratton v. *St. Louis Sw. Ry.*,
282 U.S. 10 (1930) 6, 13

Texas v. *United States*,
887 F Supp. 2d 133 (D.D.C. 2012) 19, 24

Turner Broad. Sys., Inc. v. *FCC*,
520 U.S. 180 (1997) 21

United States v. *Sandoval Cnty.*,
797 F. Supp. 2d 1249 (D.N.M. 2011) 19

Cases—continued

Vieth v. *Jubelirer*,
541 U.S. 267 (2004) ..... *passim*

Washington v. *Finlay*,
664 F.2d 913 (4th Cir. 1981) 29

Williams v. *Rhodes*,
393 U.S. 23 (1968) 29

Statutes

2 U.S.C. §§ 8(b)(4), 922(a)(5) 21

18 U.S.C. § 3626(a)(3)(B) 21

26 U.S.C. § 9010(c) 20

28 U.S.C § 1253 ..... 6, 23

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2281 ..... 5, 6, 11

28 U.S.C. § 2284 ..... *passim*

28 U.S.C. § 2284(a) ..... *passim*

28 U.S.C. § 2284(b)(1) 5

28 U.S.C. § 2284(b)(3) 6, 14

42 U.S.C. § 2000a-5(b) 21

45 U.S.C. § 719 21

47 U.S.C. § 555(c)(1) 21

52 U.S.C. § 10304(a) 6

52 U.S.C. § 30110 note 20

Pub. L. No. 94-381 § 3,
90 Stat. 1119 (1976) 5

The Voting Rights Act of 1965 ..... *passim*

Other authorities

110 Cong. Rec. 1536 (1964) 22

148 Cong. Rec. S2142 (2002) 22

Fed. R. Civ. P. 12(b)(6) ..... *passim*

Erin Cox, *"Gerrymander meander" highlights twisted district*, Baltimore Sun (Sept. 19, 2014) 7

Christopher Ingraham, *America's most gerrymandered congressional districts*, Wash. Post (May 15, 2014) 7

Mike Maciag, *Which States, Districts Are Most Gerrymandered?*, Governing (Oct. 25, 2012) 7

Leland C. Nielsen, *Three-Judge Courts: A Comprehensive Study*, 66 F.R.D. 495 (1975) 22

Note, *Judicial Limitation of Three-Judge Court Jurisdiction*, 85 Yale L.J. 564 (1976) 24

Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299 (1963) 24

S. Rep. No. 94-204 (1976), reprinted in 1976 U.S.C.C.A.N. 1988 24

PETITION FOR A WRIT OF CERTIORARI

Stephen M. Shapiro, O. John Benisek, and Maria B. Pycha respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 584 F. App'x 140. The single-judge district court's order granting respondents' motion to dismiss (App., *infra*, 3a-21a) is reported at 11 F. Supp. 3d 516.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2014. A timely petition for rehearing en banc was denied on November 12, 2014. App., *infra*, 22a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2284, Title 28, of the U.S. Code provides:

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented

shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

STATEMENT

Section 2284 of Title 28 of the U.S. Code provides that "[a] district court of three judges" shall hear any case "challenging the constitutionality of the apportionment of congressional districts" unless the single judge to whom the case is initially referred "determines that three judges are not required." This Court has held that Section 2284 "does not require the convening of a three-judge court when the [claim] is insubstantial." *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973). A claim is insubstantial, the Court explained, when it is "obviously frivolous" or "inescapably" meritless. *Ibid.*

This case involves a First Amendment challenge to the 2011 reapportionment of congressional districts in Maryland. Although recognizing that Maryland's convoluted redistricting map may violate the representational rights of a large swath of Maryland voters, a single judge declined to convene a three-judge court to consider the First Amendment claim in this case—not because the judge determined that the claim is wholly frivolous (it is not), but because, in his singular view, the complaint failed to state a First Amendment claim under Federal Rule of Civil Procedure 12(b)(6).

In taking that approach, the district court was following the Fourth Circuit's direction in *Duckworth* v. *State Administration Board of Election Laws*, 332 F.3d 769 (2003). There, the Fourth Circuit held that when a complaint fails to state a claim under Rule 12(b)(6), it is by definition "insubstantial" and properly subject to dismissal without the convening of a three-judge court. The Fourth Circuit summarily affirmed the district court's dismissal of petitioners' complaint in this case on that basis.

That decision warrants this Court's review. The Fourth Circuit's interpretation of Section 2284 conflicts with this Court's precedents and with the holdings of the D.C., Fifth, and Seventh Circuits. Because the claim at issue is non-frivolous (indeed, it should not have been dismissed at all), it should have been heard by a three-judge district court under this Court's teachings, and it would have been heard by a three-judge district court if it had been brought in any of those other jurisdictions.

Proper resolution of the question presented is a matter of great practical importance. The issue is frequently recurring, both in apportionment challenges like this one and in many other cases brought under the Voting Rights Act, Bipartisan Campaign Reform Act, Prison Litigation Reform Act, and other statutes. Congress requires such suits to be heard by three-judge district courts precisely because they implicate important and sensitive matters: The three-judge procedure provides for direct appellate review before this Court, guaranteeing timely resolutions of time-sensitive claims. And it promotes conscientious deliberation and guards against the influence of any one judge's predilections, ensuring greater public confidence and more accurate judicial decisionmaking. Further review is warranted.

A. Statutory background

This case concerns the Three-Judge Court Act of 1910. As since amended, the Act provides that a district court of three judges must be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" or "when otherwise required by Act of Congress." 28 U.S.C. § 2284(a). When a suit covered by Section

2284(a) is filed, the single-judge court to which the case is initially referred "shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge * * * to hear and determine the action or proceeding." 28 U.S.C. § 2284(b)(1).[1]

At issue here is the meaning of the phrase "unless he determines that three judges are not required." The long-settled rule is that a three-judge court is "not required" under Section 2284(a) when "the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez* v. *Automatic Emps. Credit Union*, 419 U.S. 90, 100 (1974). Because "general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial" (*McLucas* v. *DeChamplain*, 421 U.S. 21, 28 (1975)), the Three-Judge Court Act "does not require the convening of a three-judge court" in that circumstance (*Goosby*, 409 U.S. at 518).

Tied as it is to the federal courts' jurisdiction, the word "insubstantial" is a term of art in constitutional litigation—it means "'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" *Goosby*, 409 U.S. at 518 (citations omitted). In this context, "[t]he limiting words

---

[1] This language was initially codified at 28 U.S.C. § 2281 but was, in 1976, recodified at 28 U.S.C. § 2284. See Pub. L. No. 94-381 § 3, 90 Stat. 1119 (1976). The lower courts agree that the 1976 recodification had no impact on the question presented here. See *Kalson* v. *Paterson*, 542 F.3d 281, 288 n.13 (2d Cir. 2008) (citing *LaRouche* v. *Fowler*, 152 F.3d 974, 982 & n.7 (D.C. Cir. 1998), aff'd, 529 U.S. 1035 (2000)).

'wholly' and 'obviously' have cogent legal significance," indicating that "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous." *Ibid.* In contrast, "previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281." *Ibid.*

Once a case has been referred to a three-judge district court, "[a] single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except" that "[a] single judge shall not * * * enter judgment on the merits." 28 U.S.C. § 2284(b)(3).

Appeals in cases heard by three-judge district courts lie with this Court in the first instance, without intermediate review by the courts of appeals. 28 U.S.C § 1253; 52 U.S.C. § 10304(a). By contrast, "dismissal[s] of a complaint by a single judge [without convening a three-judge court] are * * * reviewable in the court of appeals." *Gonzalez*, 419 U.S. at 100. In an appeal from the refusal to convene a three-judge court, however, the court of appeals is limited to deciding whether the case should have been heard by three judges and is "precluded from reviewing on the merits a case which should have originally been determined by a court of three judges" and appealed directly to this Court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715-716 (1962) (per curiam) (citing *Stratton* v. *St. Louis Sw. Ry.*, 282 U.S. 10 (1930)).

B. Factual background

Following the 2010 census, the Maryland General Assembly enacted a congressional redistricting plan. See app., *infra*, 23a. The news media have de-

scribed the plan as the most gerrymandered in the Nation. See Mike Maciag, *Which States, Districts Are Most Gerrymandered?*, Governing (Oct. 25, 2012), http://perma.cc/82PD-XBRX; Christopher Ingraham, *America's most gerrymandered congressional districts*, Wash. Post (May 15, 2014), http://perma.cc/WWP9-454G.

The news media are not alone in their description of Maryland's congressional districts. In a separate case raising different claims from those presented here, Judge Niemeyer described Maryland's Third Congressional District as "reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887, 902 n.5 (D. Md. 2011), aff'd, 133 S. Ct. 29 (2012). The perimeter of that contorted district is an astonishing 225 miles (see Erin Cox, *"Gerrymander meander" highlights twisted district*, Baltimore Sun (Sept. 19, 2014), http://perma.cc/3W52-XB4D)—significantly longer than the entire east-west span of the State (see http://perma.cc/F8YA-VYQT).

Several other districts feature narrow, meandering ribbons linking together larger, geographically distant regions. The Sixth District, for example, connects the mountainous, westernmost region of the state with Potomac, a densely populated suburb of Washington, D.C. As District Judge Titus explained in his concurring opinion in *Fletcher*, linking these regions brings together a group of voters "who have an interest in farming, mining, tourism, paper production, and the hunting of bears * * * with voters who abhor the hunting of bears and do not know what a coal mine or paper mill even looks like." 831 F. Supp. 2d at 906.

C. Procedural background

1. Petitioners—a bipartisan group of concerned Marylanders—filed a complaint in the District Court for the District of Maryland, challenging the constitutionality Maryland's redistricting plan. As relevant here, petitioners alleged that the plan burdens their First Amendment rights "along the lines suggested by Justice Kennedy in his concurrence in *Vieth* [v. *Jubelirer*, 541 U.S. 267 (2004)]." Am. Compl. ¶ 23. See also *id.* ¶ 2 (map violates "First Amendment rights of political association"); *id.* ¶ 5 ("the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association"). According to Justice Kennedy's concurrence in *Vieth*, political gerrymanders may "impose burdens and restrictions on groups or persons by reason of their views," which "would likely be a First Amendment violation, unless the State shows some compelling interest." 541 U.S. at 315.

Petitioners also expressly requested the convening of a three-judge court. Am. Compl. ¶ 6.

2. A single-judge district court dismissed the case without referring the matter to a three-judge court. App., *infra*, 3a-21a. The court "recognize[d] that some early cases appear to eschew the traditional 12(b)(6) standard in favor of one that looks to whether a plaintiff's complaint sets forth a 'substantial question.'" App., *infra*, 7a. But, the court explained, "in the present context, the 'substantial question' standard and the legal sufficiency standard are one and the same" because, "where a plaintiff's 'pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court.'" App., *infra*, 7a-8a (quoting *Duck-*

worth, 332 F.3d at 772-773). The single-judge court therefore "appl[ied] the usual Rule 12(b)(6) standard in deciding th[e] motion." App., *infra*, 8a.

Applying that standard, the single-judge court dismissed petitioners' First Amendment claim on the merits. The court was "not insensitive to Plaintiffs' contention that Maryland's districts as they are currently drawn work an unfairness" and recognized that "[i]t may well be that the 4th, 6th, 7th, and 8th congressional districts, which are at issue in this case, fail to provide 'fair and effective representation for all citizens.'" App., *infra*, 19a-20a (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 565-566 (1964)).

The court nevertheless rejected petitioners' First Amendment claim because, in its unilateral view, the claim "is not one for which relief can be granted." App., *infra*, 21a. That is so, the court concluded, because "nothing about the congressional districts at issue in this case affects in any proscribed way Plaintiffs' ability to participate in the political debate." App., *infra*, 20a (internal quotation marks and alteration marks omitted). Petitioners "are free," the court continued, "to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." App., *infra*, 21a (internal quotation marks omitted). On that basis, the single-judge court dismissed the claim on the merits, refusing to convene a three-judge court. *Ibid.*[2]

---

[2] The court also dismissed as nonjusticiable certain other claims brought under various sections of Article I and the Fourteenth Amendment. App., *infra*, 13a-20a. The merits of the court's jusiticiability holding are not subject to challenge here. Cf. *infra*, 29 n.12.

3. The court of appeals summarily affirmed (App., *infra*, 1a-2a) and denied petitioners' request for rehearing en banc (App., *infra*, 22a).

REASONS FOR GRANTING THE PETITION

This case presents the question whether a single-judge district court may refuse to refer a non-frivolous suit governed by 28 U.S.C. § 2284(a) to a three-judge court because, in the single judge's singular view, the complaint fails to state a claim under Civil Rule 12(b)(6). In conflict with the holdings of the D.C., Fifth, and Seventh Circuits, the Fourth Circuit has held that it may.

That decision should not stand. Aside from ignoring this Court's precedents, it creates a conflict of authority among the lower courts. As a result, the Three-Judge Court Act is being applied differently in jurisdictions throughout the Nation. What is more, proper resolution of the question presented is a matter of great practical importance. Section 2284 governs not only redistricting challenges like this one, but also suits brought under the Voting Rights Act, the Prison Litigation Reform Act, Communications Act, and nearly a dozen other statutes. And this case presents a suitable vehicle with which to resolve the conflict: Petitioners' claims are not obviously frivolous and should have been decided by a three-judge panel, followed by a right of appeal directly to this Court. Further review is warranted.

A. *Duckworth* conflicts with this Court's precedents

According to the Fourth Circuit's decision in *Duckworth*, when a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district

court without convening a three-judge court." 332 F.3d at 772-773. Thus, within the Fourth Circuit, there is "no material distinction" "between a complaint that 'does not state a substantial claim for relief' and the Rule 12(b)(6) standard." *Fletcher*, 831 F. Supp. 2d at 892 (Niemeyer, J.).

The *Duckworth* rule is flatly inconsistent with this Court's precedents in two separate respects.

First, whereas *Goosby* forbids the dismissal of a case by a single-judge court when the case involves an arguable legal theory, *Duckworth* permits it. According to *Goosby*, Section 2284 "does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial." 409 U.S. at 518. But,

> '[c]onstitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.' The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'

Ibid. (internal citations omitted). The insubstantiality standard sets so high a bar because the consequences of its application are severe: "general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial." *McLucas*, 421 U.S. at 28.

But it hardly requires stating that, under the 12(b)(6) framework, "failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Hagans*, 415 U.S. at 542 (quoting *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)). Thus, the sufficiency of a complaint under Rule 12(b)(6) is "a question of law * * * [that] must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell*, 327 U.S. at 682. The basis for that conclusion is evident: "[n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable," "indisputably meritless," or "fantastic or delusional." *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989). On the contrary, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of [any] dispositive issue of law, * * * without regard to whether [the claim] is based on an outlandish legal theory or on a close but ultimately unavailing one." *Id.* at 326-327.

There is no way to reconcile this Court's holding in *Goosby* with the Fourth Circuit's decision in *Duckworth*. Indeed, *Duckworth* equates two concepts that this Court repeatedly has said are distinct. By doing so, it permits precisely what *Goosby* forbids: It allows a single-judge court to refuse to refer a non-frivolous complaint to a three-judge court based upon "previous decisions that merely render claims of doubtful or questionable merit." 409 U.S. at 518.

Second, whereas *Idlewild* forbids the courts of appeals from ruling on the merits of a case that should have been decided by a three-judge district court, *Duckworth* frequently requires it. This conflict is fundamental: "When an application for a statutory three-judge court is addressed to a [single-judge] district court, the [single-judge] court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, * * * and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild*, 370 U.S. at 715. If the requirements are met, the case must be referred to a three-judge court, appeals from which are reserved exclusively for this Court's mandatory docket. *Gonzalez*, 419 U.S. at 97.

Thus, when a plaintiff appeals from a single-judge court's refusal to refer a matter to a three-judge court, the court of appeals must determine whether the refusal was proper, *and no more*; it is "precluded from reviewing on the merits a case which should have originally been determined by a court of three judges." *Idlewild*, 370 U.S. at 715-716 (citing *Stratton*, 282 U.S. at 10). That conclusion follows not only from this Court's exclusive mandatory jurisdiction over such cases on appeal, but also from the settled rule that a court of appeals' "jurisdiction over the merits of [a] claim[] is a function of the district court's jurisdiction" over the claim. *Page* v. *Bartels*, 248 F.3d 175, 184 (3d Cir. 2001).

Duckworth turns that settled jurisdictional framework on its head. Under *Duckworth*, the Fourth Circuit must review the merits of any case dismissed under Rule 12(b)(6), even when the court ultimately determines that the dismissal was erroneous and a three-judge court should have been con-

vened. As a result, the Fourth Circuit will inevitably find itself issuing merits holdings that paradoxically deprive it of jurisdiction to issue merits holdings, in manifest conflict with *Idlewild*. There is no way around that conflict or the conflict with *Goosby*.[3]

B. *Duckworth* conflicts with the holdings of other courts of appeals

Unsurprisingly, *Duckworth* also conflicts with the holdings of other courts of appeals. Two other courts of appeals—the D.C. Circuit and Fifth Circuit—have confronted the question whether single-judge courts are permitted to rule on motions to dismiss and have held that they cannot. Both courts thus require single-judge district courts to refer Section 2284 cases to three-judge district courts unless the complaint is obviously frivolous. And in a different legal context, the Seventh Circuit expressly rejected the reasoning that underlies *Duckworth*. The outcome of this case would have been different in any one of those other jurisdictions.

District of Columbia Circuit. The District of Columbia Circuit's holding in *LaRouche* v. *Fowler*, 152 F.3d 974 (D.C. Cir. 1998), aff'd, 529 U.S. 1035 (2000), expressly rejected the rule later adopted by the Fourth Circuit in *Duckworth*.

---

[3] *Duckworth* also short-circuits Section 2284(b)(3)'s prohibition on merits rulings by single-judge courts. To be sure, "[t]he constraints imposed by § 2284(b)(3) on a single district judge's authority to act are not triggered unless the action is one that is required, under the terms of § 2284(a), to be heard by a district court of three judges," which is the question at issue. *Page*, 248 F.3d at 184. But according to *Duckworth*, before Section 2284(b)(3)'s prohibition on merits rulings by single-judge courts can be "triggered," the single-judge court *must issue a ruling on the merits*. That makes nonsense of the statutory scheme.

The plaintiff in *LaRouche* "sought the appointment of a three-judge district court to hear the case, pursuant to section 5 of the Voting Rights Act and 28 U.S.C. § 2284." 152 F.3d at 977. But "the district court denied the application for a three-judge court and dismissed the entire complaint, with prejudice as to all defendants, pursuant to Fed. R. Civ. P. 12(b)(6)." *Ibid.*

On appeal, the D.C. Circuit held that it "lack[ed] jurisdiction to decide the merits of [the case] because the [merits] question properly belong[ed] before a three-judge district court." *LaRouche*, 152 F.3d at 981. In reaching that conclusion, Judge Garland, writing for the court, explained that Section 2284 permits "a single judge [to] determine that three judges are not required * * * only if a plaintiff's challenge is wholly insubstantial." *Id.* at 982 (internal quotation marks and alteration marks omitted). A single-judge court may not, however, "determine the merits of [the] claims." *Id.* at 981.

Thus, the D.C. Circuit rejected the Democratic National Committee's argument that Section 2284 "permit[s] a single judge to grant a motion to dismiss" under the Rule 12(b)(6) standard. *LaRouche*, 152 F.3d at 982. According to that court, a single-judge court has no authority to "enter judgment on the merits of a claim * * * that is not 'wholly insubstantial' or 'obviously frivolous.'" *Id.* at 983. And the "substantiality" necessary to get to a three-judge court requires only a "minimal" showing: "'A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be

raised can be the subject of controversy.'" *Id.* at 982 (quoting *Goosby*, 409 U.S. at 518).

Finding that the claims in that case were not obviously frivolous, the D.C. Circuit held that the single-judge court erred by dismissing the plaintiff's claims under Rule 12(b)(6) and "remand[ed] them for consideration by a three-judge court." *LaRouche*, 152 F.3d at 986. Recognizing the difference between frivolousness and failure to state a claim, moreover, the court was careful to "say only enough to determine whether LaRouche's claims [were] 'obviously frivolous' or 'wholly insubstantial,' and not to intimate a final view as to their merits." *Id.* at 983.

Fifth Circuit. The Fifth Circuit took a similar approach in *LULAC of Texas* v. *Texas*, 113 F.3d 53 (5th Cir. 1997) (per curiam), a Voting Rights Act case. There, "[t]he district court, without convening a three-judge court, * * * concluded that no election change had occurred" during the relevant time "and dismissed appellants' claims pursuant to Fed. R. Civ. P. 12(b)(6)." *Id.* at 55.

On appeal, the Fifth Circuit explained that Section 5 cases generally "must be referred to a three-judge court for the determination of whether the political subdivision has adopted a change covered by § 5 without first obtaining preclearance." *LULAC*, 113 F.3d at 55. "However, where § 5 claims are 'wholly insubstantial' and completely without merit, such as where the claims are frivolous, essentially fictitious, or determined by prior case law, a single judge may dismiss the claims without convening a three-judge court." *Ibid.*

Recognizing that the plaintiff's claims were arguable, the Fifth Circuit could not "conclude that

from a legal standpoint LULAC's claim is 'wholly insubstantial.'" *LULAC*, 113 F.3d at 55. On that basis, the Fifth Circuit held that the single-judge court had erred by not referring the matter to a three-judge court: "Because we conclude that neither the legal nor the factual basis for LULAC's § 5 claim is 'wholly insubstantial,' we reverse the district court's order dismissing LULAC's claim and remand for the convening of a three-judge court." *Id.* at 56.

Seventh Circuit. The decision below is also irreconcilable with the Seventh Circuit's decision in *Bovee* v. *Broom*, 732 F.3d 743 (7th Cir. 2013). As that court explained in a different legal context, "a constitutional theory can be so feeble that it falls outside federal jurisdiction." *Id.* at 744 (citing *Goosby* and *Hagans* v. *Lavine*, 415 U.S. 528 (1974)). But, according to the Seventh Circuit, a dismissal under the *Goosby* standard (which calls for a decision on jurisdiction) is distinct from a dismissal under the Rule 12(b)(6) standard (which calls for a decision "on the merits"). *Ibid.* The court thus rejected the "assum[ption] that any complaint that fails to state a claim on which relief may be granted also falls outside federal subject-matter jurisdiction." *Ibid.* Unless a claim is "obviously frivolous" (and assuming that "all [other] formal aspects of a federal claim [are] satisfied"), the claim must be "resolved on the merits rather than tossed for lack of jurisdiction." *Ibid.*

Duckworth cannot be sqaured with *LaRouche*, *LULAC*, or *Bovee*. There is no doubt that this case would have been heard by a three-judge district court in the D.C., Fifth, and Seventh Circuits. Further review is therefore warranted to ensure that

Section 2284 is applied uniformly throughout the Nation.[4]

C. The question presented is important

Whether a case like this one should be dismissed by a single-judge court or instead referred to a three-judge court is a recurring matter of substantial practical importance, and this case affords an ideal opportunity to address the issue.

1. The question presented arises in a great many cases. Three-judge district courts are most commonly convened to consider matters relating to redistricting following a decennial census. Following the 2010 census—the first census conducted after *Duckworth* was decided in 2003—three-judge courts were convened in two dozen voter-right-related cases outside the Fourth Circuit.[5] Doubtless, many of those cases

---

[4] The case would likely have been referred to a three-judge court in the Second and Third Circuits, as well. The Second Circuit applied the obviously-frivolous standard in *Kalson* v. *Paterson*, 542 F.3d 281 (2008). The Third Circuit did the same in *Page*. And the substantiality doctrine, according to the Third Circuit, "set[s] an extremely high bar": "To be deemed frivolous, a constitutional claim must be 'essentially fictitious,' 'wholly insubstantial,' and 'legally speaking non-existent.'" 248 F.3d at 192 (quoting *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962)).

[5] See *Arizona State Leg.* v. *Arizona Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014); *Evenwel* v. *Perry*, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014); *Harris* v. *Arizona Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014) (per curiam), statement of jurisdiction filed, 83 U.S.L.W. 3118 (U.S. Aug. 25, 2014) (No. 14-232); *Kostick* v. *Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013) (per curiam), aff'd, 134 S. Ct. 1001 (2014); *Brown* v. *Kentucky Leg. Research Comm'n*, 966 F. Supp. 2d 709 (E.D. Ky. 2013) (per curiam); *Perez* v. *Texas*, 970 F. Supp. 2d 593 (W.D. Tex. 2013); *Alabama Leg. Black Caucus* v. *Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala.

would have been dismissed (improperly, we submit) by single-judge courts if they had been filed in the Fourth Circuit.

Within the Fourth Circuit, the convening of a three-judge district court was requested in ten cases after the 2010 census, including in this one; those requests were granted in six cases[6] and denied in

---

2013); *New Hampshire* v. *Holder*, 293 F.R.D. 1 (D.D.C. 2013); *Baldus* v. *Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam); *Essex* v. *Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012) (per curiam); *Favors* v. *Cuomo*, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *James* v. *FEC*, 914 F. Supp. 2d 1 (D.D.C. 2012), vacated, 134 S. Ct. 1806 (2014); *McCutcheon* v. *FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), rev'd, 134 S. Ct. 1434 (2014); *Mi Familia Vota Educ. Fund* v. *Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012); *NAACP* v. *Snyder*, 879 F. Supp. 2d 662 (E.D. Mich. 2012) (per curiam); *Texas* v. *United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), vacated and remanded, 133 S. Ct. 2885 (2013); *Desena* v. *Maine*, 793 F. Supp. 2d 456 (D. Me. 2011); *Little* v. *Strange*, 796 F. Supp. 2d 1314 (M.D. Ala. 2011) (per curiam); *Petteway* v. *Henry*, 2011 WL 6148674 (S.D. Tex. Dec. 9, 2011); *Schonberg* v. *FEC*, 792 F. Supp. 2d 14 (D.D.C. 2011) (per curiam); *Smith* v. *Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011); *United States* v. *Sandoval Cnty.*, 797 F. Supp. 2d 1249 (D.N.M. 2011) (per curiam); *Clemons* v. *U.S. Dep't of Commerce*, 710 F. Supp. 2d 570 (N.D. Miss.), vacated, 131 S. Ct. 821 (2010); *City of Kings Mountain* v. *Holder*, 746 F. Supp. 2d 46 (D.D.C. 2010) (per curiam).

[6] *Page* v. *Virginia State Bd. of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014); *Somers* v. *South Carolina State Election Comm'n*, 871 F. Supp. 2d 490 (D.S.C. 2012); *Backus* v. *South Carolina*, 857 F. Supp. 2d 553 (D.S.C.), aff'd, 133 S. Ct. 156 (2012); *Jefferson Cnty. Comm'n* v. *Tennant*, 876 F. Supp. 2d 682 (S.D. W. Va.), rev'd and remanded, 133 S. Ct. 3 (2012) (per curiam); *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), aff'd, 133 S. Ct. 29 (2012); *Butler* v. *City of Columbia*, 2010 WL 1372299 (D.S.C. Apr. 5, 2010).

four.[7] In three of the four denials, a single judge, sitting alone, invoked *Duckworth* to dismiss the case on the merits under Rule 12(b)(6).[8] The question presented is therefore affecting the treatment of many challenges to the reapportionment of congressional districts.

The question presented is also relevant to many more cases outside the redistricting context. Section 2284 provides for the convocation of three-judge courts to hear any case when "otherwise required by Act of Congress." 28 U.S.C. § 2284(a). There are over one dozen other statutory provisions that require the convening of three-judge courts under Section 2284, including several relevant to campaigning and elections, like the Voting Rights Act (52 U.S.C. §§ 10101(g), 10303(a)(5), 10304(a), 10306(c), 10504, 10701(a)(2)), the Bipartisan Campaign Reform Act (52 U.S.C. § 30110 note), and the Presidential Election Campaign Fund Act (26 U.S.C. § 9010(c)).[9]

---

[7] In addition to this case, see *Gorrell* v. *O'Malley*, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson* v. O'Malley, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Carter* v. *Virginia State Bd. of Elections*, 2011 WL 1637942 (W.D. Va. Apr. 29, 2011).

[8] Those cases included *Gorrell*, *Olson*, and this case. In addition, and notwithstanding the Third Circuit's decision in *Page*, the Eastern District of Pennsylvania recently declined to convene a three-judge court under the *Duckworth* standard. See *Garcia* v. *2011 Legislative Reapportionment Com'n*, 938 F. Supp. 2d 542, 554 (E.D. Pa. 2013) (citing *Duckworth*, 332 F.3d at 772-773). The Third Circuit affirmed on unrelated standing grounds. *Garcia* v. *2011 Legislative Reapportionment Com'n*, 559 F. App'x 128 (3d Cir. 2014).

[9] Among the notable cases heard by three-judge district courts under those statutes are *McCutcheon* v. *FEC*, 134 S. Ct. 1434 (2014) (BCRA), *Perry* v. *Perez*, 132 S. Ct. 934 (2012) (VRA), *Citizens United* v. *FEC*, 558 U.S. 310 (2010) (BCRA), *League of*

Other statutes requiring three-judge review include the Prison Litigation Reform Act (18 U.S.C. § 3626-(a)(3)(B)), and the Communications Act (47 U.S.C. § 555(c)(1)),[10] among others. See 2 U.S.C. §§ 8(b)(4), 922(a)(5); 42 U.S.C. § 2000a-5(b); 45 U.S.C. § 719.

The question presented is likely to affect many suits brought under these other important statues. A question that recurs so frequently under so many different statutes deserves nationwide resolution.

2. The question presented is also inherently important, wholly apart from its perpetual recurrence. "Allegations of unconstitutional bias in apportionment are most serious claims." *Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring). Congress requires the convening of three-judge courts in congressional redistricting cases because "[q]uestions regarding the legitimacy of the state legislative apportionment (and particularly its review by the federal courts) are highly sensitive matters." *Page*, 248 F.3d at 190. "[I]n such redistricting challenges, the potential for

---

United Latin American Citizens v. *Perry*, 548 U.S. 399 (2006) (VRA), *McConnell* v. *FEC*, 540 U.S. 93 (2003) (BCRA), and *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) (Presidential Election Campaign Fund Act). These cases remain frequently recurring. *E.g.*, *Rufer* v. *FEC*, 2014 WL 4076053, at *4-5 (D.D.C. Aug. 19, 2014) (in a BCRA case, declining to reach the merits and applying the substantiality standard instead).

[10] Among the notable cases heard by three-judge district courts under the PLRA and Communications Act are *Brown* v. *Plata*, 131 S. Ct. 1910 (2011) (PLRA), *Coleman* v. *Brown*, 952 F. Supp. 2d 901 (E.D. Cal. 2013) (PLRA), *Coleman* v. *Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009) (PLRA), *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180 (1997) (Communications Act), and *National Interfaith Cable Coal., Inc.* v. *FCC*, 512 U.S. 1230 (1994) (Mem.) (Communications Act).

federal disruption of a state's internal political structure is great." *Ibid.* As this Court has noted, such cases typically involve "confrontations between state and federal power * * * [and the] potential for substantial interference with government administration." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 562 (1969).

The importance and sensitivity of redistricting challenges "counsel[] in favor of the establishment of a specialized adjudicatory machinery" (*Page*, 248 F.3d at 190) for two reasons.

First, the three-judge procedure, which bypasses review by the circuit courts and permits direct appeals to this Court, "accelerat[es] a final determination on the merits." Leland C. Nielsen, *Three-Judge Courts: A Comprehensive Study*, 66 F.R.D. 495, 499 (1975). See also 148 Cong. Rec. S2142 (2002) (three-judge courts ensure "prompt and efficient resolution of the litigation") (statement of Sen. Feingold). Speedy resolution of cases subject to Section 2284 is essential because "the length of time required to appeal through the circuit courts to the Supreme Court" may be "disrupt[ive]" to the state laws being challenged. Nielsen, 66 F.R.D. at 499-500. In voting rights cases—the merits of which are implicated in each election annually—delay may also undermine the underlying purpose of the suit: "a court order permitting a man to vote is a hollow victory, when the order is handed down after the election has been held and the votes counted." 110 Cong. Rec. 1536 (1964) (statement of Congressman McCulloch).

The difference between appeals from single-judge courts and three-judge courts thus has very real consequences. Take, for example, this Court's consideration this Term of *Arizona State Legislature* v. *Ari-*

zona Independent Redistricting Commission, No. 13-1314. In that case, the initial single-judge court recognized that the plaintiffs' claims were unlikely to succeed on the merits but properly referred the matter to a three-judge court because the judge could not say that "the plaintiff's constitutional claim is so obviously foreclosed * * * that there can be no controversy on the issue as a matter of law." *Ariz. State Leg.* v. *Ariz. Indep. Redistricting Comm'n*, 2013 WL 4177067, at *3 (D. Ariz. Aug. 14, 2013). A three-judge court later granted the defendants' motion to dismiss (997 F. Supp. 2d 1047, 1056 (D. Ariz. 2014)), and an appeal was taken directly to this Court.

The course of that case would have been very different if it had arisen in the Fourth Circuit. Under *Duckworth*, the initial single-judge court would have had authority to grant the defendant's motion to dismiss without referring the matter to a three-judge court. Thus, rather than appealing immediately to this Court from a decision of a three-judge court pursuant to Section 1253, the Arizona legislature would have had to notice an appeal to the circuit court—a process that, by itself, may have dragged on for longer than two years. If the appellate court had affirmed, there would have been no review as of right before this Court. And if it had reversed, the case would have gone back down to a three-judge court, and only once that court had issued a decision on the merits would a direct appeal to this Court have been available.

Congress never intended for time-sensitive redistricting cases to be decided according to such a convoluted process; it "preserve[d] three-judge courts for cases" like this one precisely because "these issues are of such importance that they ought to be heard

by a three-judge court," with the benefit of streamlined appellate review. *Page*, 248 F.3d at 190 (quoting S. Rep. No. 94-204 (1976), reprinted in 1976 U.S.C.C.A.N. 1988, 1996).

Second, convening three-judge courts "assure[s] more weight and greater deliberation by not leaving the fate of such litigation to a single judge." *Phillips* v. *United States*, 312 U.S. 246, 250 (1941). In other words, the procedure "affords a greater likelihood of freedom from personal bias, of careful deliberation, and of recognition of the seriousness of the issue involved." Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299, 302 (1963). This not only "reduce[s] the chance that * * * state [action will] be invalidated by the caprice or bias of a single judge" but also "quiet[s] public discontent with unpopular decisions" because "people [can] rest [more] eas[ily] under" a decision by three judges. Note, *Judicial Limitation of Three-Judge Court Jurisdiction*, 85 Yale L.J. 564, 565 & n.7 (1976) (internal quotation marks omitted).

These observations are not merely academic. It is not uncommon for a three-judge district court to decide a case by divided vote.[11] Such disagreement among judges in cases like this one opens the very real possibility that some cases dismissed by single-

---

[11] See *Harris*, 993 F. Supp. 2d at 1080-1090 (Silver, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 1090-1109 (Wake, J., concurring in part, dissenting in part, and dissenting from the judgment); *Alabama Leg. Black Caucus*, 988 F. Supp. 2d at 1315-1343 (Thompson, J., concurring in part and dissenting in part); *Texas*, 887 F. Supp. 2d at 190-196 (Griffith, J., dissenting in part); *Petteway*, 2011 WL 6148674, at *3-*9 (Hoyt, J., dissenting).

judge district courts under *Duckworth* would have been decided differently by courts of three judges.

Indeed, that is just what happened in a recent Voting Rights Act case in the Fifth Circuit: A single judge refused to refer the matter to a three-judge court and dismissed the case under the traditional 12(b)(6) framework. Order at 11-13, *LULAC* v. *Texas*, No. 5:08-cv-389 (W.D. Tex.) (Dkt. 15). The Fifth Circuit reversed and remanded with instructions to convene a three-judge court. 318 F. App'x 261 (5th Cir. 2009) (per curiam). On remand, the three-judge court denied summary judgment to the defendants (651 F. Supp. 2d 700 (W.D. Tex. 2009)), who subsequently obtained the Section 5 preclearance that the plaintiffs had argued all along was required (428 F. App'x 460, 462 (5th Cir. 2011) (per curiam)).

Page is also an instructive example. In the words of the Third Circuit, the district court's opinion denying relief in that case was "less than pellucid." 248 F.3d at 186. Cognizant of "the potentially disruptive effects that [its] actions could have on New Jersey's electoral process," the Third Circuit—sitting, of course, as a panel of three judges—issued a lengthy and fastidious opinion disagreeing with the single-judge court and "articulat[ing] [its] disposition * * * with surgical accuracy." 248 F.3d at 179, 198. Against this backdrop, there is no serious question that review by a three-judge court affects the quality of judicial decisionmaking and has the potential to change outcomes on the merits.

This Court's immediate intervention is therefore imperative. Given the cyclical nature of most election-related litigation under Section 2284, there may not be another opportunity to resolve the question presented until after the next census in 2020. And by

the time such a case finally wends its way to this Court's doors, several more cases are likely to have been improperly dismissed under *Duckworth*. Conversely, if *Duckworth* was rightly decided, many more cases outside the Fourth Circuit will have been erroneously referred to three-judge courts.

This case presents a clean, uncomplicated vehicle for resolving the question presented. The Court accordingly should take this opportunity to restore uniformity to the application of Section 2284 throughout the Nation.

D. Petitioners' First Amendment claim is not obviously frivolous

Because petitioners' First Amendment claim is not frivolous—indeed, it should not have been dismissed even under Rule 12(b)(6)—the single-judge district court's application of *Duckworth* improperly deprived them of consideration of their claim by a three-judge court and an immediate appeal to this Court.

Petitioners allege that Maryland's redistricting map violates their First Amendment rights. Giving the claim little more than the back of its hand, the single-judge court stated conclusorily that the redistricting map does not limit petitioners' "ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves" or "to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." App., *infra*, 20a-21a (internal quotation marks omitted). And it asserted that First Amendment protections do not, in any event, "extend beyond those more directly, and per-

haps only, provided by the fourteenth and fifteenth amendments." App., *infra*, 21a (internal quotation marks omitted).

None of this Court's precedents compels those conclusions. On the contrary, Justice Kennedy's concurrence in *Vieth*—which may be understood as the controlling opinion in that case (see *Marks* v. *United States*, 430 U.S. 188, 193 (1977))—confirms that citizens enjoy an essential First Amendment interest in not being "burden[ed] or penaliz[ed]" for "participation in the electoral process," for their "voting history," for "association with a political party," or for "expression of political views." 541 U.S. at 314 (citing *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality) and *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000)).

Thus, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). "In the [specific] context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Ibid.* And "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id.* at 315.

That is just what petitioners have alleged here. Maryland's congressional redistricting map subjects Republicans to disfavored treatment by sorting them into distant Democratic-dominated districts based on their past voting behavior and political-party affilia-

tion. In combination with Maryland's closed primary system, the redistricting map thus "burden[s]" Republican voters on the basis of their "voting history" and "association with a political party." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

That is not all. The end result of the Maryland gerrymander is not only to penalize Republican Marylanders for exercising core First Amendment rights, but also to discourage them from further engaging in the political process *at all*, whether by association with their political party, expression of their political views, or any other form of political participation. By condemning Republicans to a Sisyphean fate, in other words, Maryland's redistricting map (together with a closed primary system) chills those First Amendment activities that are most essential to the proper functioning of representative government.

This Court's ballot-access cases thus offer an additional basis for measuring the burdens at issue here: "A burden that falls unequally on [particular] political parties * * * impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 (1983). On this score, "[t]he inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements* v. *Fashing*, 457 U.S. 957, 964 (1982) (quoting *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974)). Thus, for example, "classification schemes that impose burdens on new or small political parties or independent candidates" may violate "First Amendment interests in ensuring freedom of association" by effectively penalizing individuals' "association with particular political parties." *Id.* at 964-965. "Consequently, the

State may not act to maintain the 'status quo' by making it virtually impossible for" candidates from other parties to achieve certain measures of electoral success. *Id.* at 965. (citing *Williams* v. *Rhodes*, 393 U.S. 23, 25 (1968)). That is what is alleged here.

In dismissing petitioners' First Amendment claim all the same, the lower court relied exclusively on prior opinions of the District of Maryland and the Fourth Circuit. See App., *infra*, 20a-21a (citing *Duckworth* v. *State Bd. of Elections*, 213 F. Supp. 2d 543, 557-558 (D. Md. 2002); *Anne Arundel Cty. Republican Cent. Comm.* v. *State Admin. Bd. of Elections*, 781 F. Supp. 394, 401 (D. Md. 1991); and *Washington* v. *Finlay*, 664 F.2d 913, 927 (4th Cir. 1981)). But none of those cases deals with the arguments laid out above. And in any event, a claim can be substantial despite the existence of adverse circuit precedent, as, for example, when it is inconsistent with intervening Supreme Court precedent.

Against this legal backdrop, petitioners' First Amendment claim is non-frivolous and, indeed, should not have been dismissed under the more demanding Rule 12(b)(6) standard. Petitioners accordingly were entitled to present their case to a three-judge district court.[12]

---

[12] If the Court grants the petition and ultimately remands the First Amendment claim for consideration by a three-judge court, it should do so with instructions to refer the entire complaint. See *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 504 n.5 (1972) (if a single claim in a complaint is properly referred to a three-judge court, "three-judge court jurisdiction exists over all of [the] claims [in the complaint]," including ones that might not independently qualify); *Page*, 248 F.3d at 187-188 ("the entire case, and not just [certain] claims, must be heard by a three-judge court").

CONCLUSION

The petition should be granted.

Respectfully submitted.

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
JEFFREY S. REDFERN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for Petitioners

FEBRUARY 2015

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-1417

O. John Benisek; Stephen M. Shapiro; Maria B. Pycha,

Plaintiffs-Appellants,

v.

Bobbie S. Mack, Chairman; Linda H. Lamone,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore

James K. Bredar, District Judge

(1:13-cv-03233-JKB)

Submitted: Sept. 30, 2014

Decided: Oct. 7, 2014

Before NIEMEYER and KING, Circuit Judges, and DAVIS, Senior Circuit Judge.

PER CURIAM:

O. John Benisek, Stephen Shapiro, and Maria Pycha appeal the district court's order dismissing a civil complaint challenging, on several grounds, Maryland's congressional districting plan enacted by the state legislature in 2011. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Benisek v. Mack, No. 1:13-cv-03233-JKB (D. Md. Apr. 8, 2014). We deny Shapiro's motion for oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v.

BOBBIE S. MACK, Chair, Maryland State Board of Elections, *et al.*, in their official capacities,

Defendants.

Civil No. JKB-13-3233

MEMORANDUM

O. John Benisek, Stephen M. Shapiro, and Maria B. Pycha (collectively "Plaintiffs") brought this suit against Bobbie S. Mack, Chair of the Maryland State Board of Elections, and Linda H. Lamone, State Administrator of the Maryland State Board of Elections, (collectively "Defendants"), in their official capacities, alleging that the 2011 congressional districts established by the Maryland General Assembly violate Plaintiffs' rights under Article I, Section 2 of the United States Constitution, as well as under the First and Fourteenth Amendments to the United States Constitution. Now pending before the Court is Defendants' motion to dismiss for failure to state a claim (ECF No. 13). The issues have been briefed and no hearing is required. Local Rule 105.6. For the reasons set forth below, the motion will be granted.

I. BACKGROUND[1]

In 2011, following the 2010 decennial census, the Maryland General Assembly enacted a congressional redistricting plan. Md. Code Ann., Elec. Law § 8-701 *et seq.*; (Am. Compl., ECF No. 11, at ¶¶ 7-8.) This plan closely followed the recommendations of the Governor's Redistricting Advisory Committee ("GRAC"), which included the President of the Maryland Senate and the Speaker of the Maryland House of Delegates. (Am. Compl. at ¶ 8.) Several of the districts created under this plan—in particular the 4th, 6th, 7th, and 8th congressional districts—are composed of two "de-facto non-contiguous segments—i.e., discrete segments that would be wholly non-contiguous but for the placement of one or more narrow orifices or ribbons connecting the discrete segments." (*Id.* at ¶ 10.) Further, in each of these districts, one of the two "de-facto non-continuous segments" is "far more populous than the other as well as being socioeconomically, demographically, and politically inconsistent with the other segment" (*Id.* at ¶ 11.)

For example, Plaintiffs describe the 4th congressional district as follows[2]:

> This district is a majority African-American district that was first developed in 1990 to account for the increasing population of African-American residents within Prince

---

[1] The facts are recited here as alleged by the Plaintiff, this being a motion to dismiss. See Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997).

[2] Plaintiffs make similar claims as to the 6th, 7th, and 8th congressional districts. (*Id.* at ¶ 12(b)-(d).).

> George's County. The dominant portion of the 4th district is centered in the portion of Prince George's County within the Capital Beltway and bordering the District of Columbia. This portion of the [congressional] district contains 450,000 residents who are predominantly (74%) African-American (and 16% Hispanic and 6% white), urban, lower-middle income, and overwhelmingly Democratic voters. President Obama received 96% of the vote within this portion in 2008. This segment is attached through a narrow ribbon to the smaller segment of 185,000 residents in northeastern Anne Arundel County who are predominantly Republican voters. President Obama received 42% of the vote within this portion in 2008. These Anne Arundel residents share little in common with their Prince George's counterparts that is relevant to effective or meaningful representation.... Given the composition of this district, its Representative will be elected by the voters of the Prince George's segment, and will almost certainly be a Democrat.... As [a] practical matter, the election of the district's Representative will be determined by the Democratic primary election.

(*Id.* at ¶¶ 12(a)(1)-(2).)

On November 11, 2013, Plaintiffs filed this suit challenging "the narrow ribbons and orifices used to tie de-facto non-contiguous and demographically inconsistent segments into individual districts." (*Id.* at ¶ 2.) Specifically, Plaintiffs allege that the "non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th,

7th, and 8th [c]ongressional districts" violates their rights "of representation as protected by Article I Section 2 of the U.S Constitution," their "right to vote for Representatives to Congress, as protected by both the first and second clauses to the 14th Amendment of the U.S. Constitution," and their "First Amendment rights of political association." (*Id.*)

On December 2, 2013, Plaintiffs filed an amended complaint. (Am. Compl.) Defendants now move to dismiss this amended complaint for failure to state a claim for which relief can be granted. (ECF No. 13.)

II. LEGAL STANDARD

The present action challenges the "constitutionality of the apportionment of congressional districts" and is therefore required to be heard and determined by a "district court of three judges." 28 U.S.C. § 2284(a). However, the single judge to whom the request for a three-judge panel is presented may "determine[] that three judges are not required" and "may conduct all proceedings except the trial and enter all orders permitted by the rules of civil procedure except as provided in this subsection."[3] § 2284(b)(1), (3). In particular, the single judge may grant a defendant's motion to dismiss under Rule 12(b)(6) where a plaintiff's pleadings fail to state a claim for which relief can be granted. *Duckworth v. State Admin. Bd. Of Election Laws*, 332 F.3d 769 (4th Cir. 2003).

---

[3] The statute further provides that "[a] single judge shall not appoint a master, or order a reference or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits." § 2284(b)(3).

This motion to dismiss, like all others under Rule 12(b)(6) of the Federal Rules of Civil Procedure, is a test of the legal sufficiency of a complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). *See also Ashcroft v. Iqbal*, 556 U.S. 66Z 678 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 556-57 (2007). The Court will therefore evaluate it under the usual Rule 12(b)(6) standard.

The Court recognizes that some early cases appear to eschew the traditional 12(b)(6) standard in favor of one that looks to whether a plaintiff's complaint sets forth a "substantial question." *Faustino v. Immigration and Naturalization Services*, 302 F. Supp. 212, 213 (S.D.N.Y. 1969), aff'd 386 F.2d 449, cert. denied 391 U.S. 915; *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 884 (S.D.N.Y. 1967), *aff'd* 386 F.2d 449, *cert. denied* 391 U.S. 915. In *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 D.2d 606 (4th Cir. 1970), for example, the Fourth Circuit held that "[w]hen it appears that there is no substantial question for a three judge court to answer, dismissal of the claim for injunctive relief by the single district judge is consistent with the purpose of the three-judge statutes, and it avoids the waste and delay inherent in a cumbersome procedure." *Id.* at 611 (emphasis added); *see also Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980) ("[T]he plaintiffs have not alleged sufficient facts to raise a substantial claim requiring the convening of a three-judge court.") (emphasis added).

However, in fact, in the present context, the "substantial question" standard and the legal sufficiency standard are one and the same. In *Duckworth*, 332 F.3d 769, the Fourth Circuit clarified that where

a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Id.* at 772-73. Further, in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), a three judge panel of this Court held that "[f]or purposes of construing § 2284, we find no material distinction" between the Rule 12(b)(6) standard and the "substantial question" standard. *Id.* at 892. Therefore, the Court will apply the usual Rule 12(b)(6) standard in deciding this motion.

To pass the Rule 12(b)(6) legal sufficiency test, a complaint need only present enough factual content to render its claims "plausible on [their] face" and enable the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff may not, however, rely on naked assertions, speculation, or legal conclusions. *Bell Atl. v. Twombly*, 550 U.S. 544, 556-57 (2007). In assessing the merits of a motion to dismiss, the court must take all well-pled factual allegations in the complaint as true and construe them in the light most favorable to the Plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). If after viewing the complaint in this light the court cannot infer more than "the mere possibility of misconduct," then the motion should be granted and the complaint dismissed. *Iqbal*, 556 U.S. at 679.

III. ANALYSIS

Plaintiffs' complaint sets forth two claims. The first is a claim made under both Article I, Section 2 and the Fourteenth Amendment of the United States Constitution. (Am. Compl. at ¶ 2; ECF No. 18 at 28.) Specifically Plaintiffs "claim that the structure and

composition of the 4th, 6th, 7th, and 8th districts constitute impermissible abridgment of representational and voting rights." (ECF No. 18 at 28.) The second is a claim under the First Amendment to the United States Constitution. (Am. Compl. at ¶¶ 5, 23, 32, 32; ECF No. 18 at 41.) With regard to this second claim, Plaintiffs allege that "the intentional structure and composition of the challenged districts, aggravated by the operation of Maryland's closed primary election system" infringes upon their First Amendment rights as Republican voters. (ECF No. 18 at 41.)

The Court will consider these two claims in turn. However, the Court will first address Defendants' assertion that the present action is barred by *res judicata*.

A. Res judicata

In their motion to dismiss, Defendants assert that because the congressional redistricting plan at issue in this case was previously upheld in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md.), *summarily aff'd* 133 S. Ct. 29, the instant lawsuit should be dismissed under principles of *res judicata*. Ultimately, however, the Court does not find Defendants' argument persuasive.

Fletcher involved a lawsuit brought by nine African-American residents of Maryland against state election officials, in which plaintiffs alleged that the 2011 congressional redistricting plan violated "their rights under Article I, § 2, of the U.S. Constitution; the Fourteenth and Fifteenth Amendments of the U.S. Constitution; and § 2 of the Voting Rights Act of 1965 because the plan dilutes African-American voting strength within the State and intentionally dis-

criminates against African-Americans." *Id.* at 890. Particularly relevant to the case at bar is the *Fletcher* plaintiffs' claim that "Maryland's redistricting plan is an impermissible partisan gerrymander. Specifically, they argue[d] that the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." *Id.* at 904. The *Fletcher* Court rejected Plaintiffs' arguments on this count—and all other counts and entered judgment for the State on a motion for summary judgment. *Id.*

In this Circuit, "[f]or the doctrine of *res judicata* to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits." *Martin v. American Bancoporation Retirement Plan*, 407 F.3d 643, 651 (4th Cir. 2005) (quoting *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004)). With regard to the third element, under the theory of "virtual representation," a non-party whose interests were adequately represented by a party to the original action will be considered in privity with that original party. *Id.* However, virtual representation is narrowly defined:

> The doctrine of virtual representation does not authorize application of a bar to relitigation of a claim by a nonparty to the original judgment where the parties to the first suit are nor accountable to the nonparties who file a subsequent suit. In addition, a party acting as a virtual representative for a nonparty must do so with at least the tacit approval of the court.

Id. (quoting *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987)). The essential question in determining whether the "tacit approval" requirement is met is "whether there is a disclosed relationship in which the party is accorded authority to appear as a party on behalf of others." *Id.* (quoting Restatement (Second) of Judgments § 36 (1), cmt. b (1982)).

Here, Defendants assert that there is an identity of the cause of action in both the present suit and the *Fletcher* suit. Indeed, Defendants offer that "[a]lthough not clear in every respect, the *Benisek* Plaintiffs' claims focus on the shapes of the congressional district and the effect that those shapes have on voters. Those same types of claims were litigated extensively in *Fletcher*, and there can be no doubt that the three-judge court carefully reviewed the shapes of the districts." (ECF No. 13-2 at 10.) However, at issue in *Fletcher* was the fact that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the [s]ixth [d]istrict." *Fletcher*, 831 F. Supp.2d at 904. In the case at bar, however, Plaintiffs' claim regards the 4th, 6th, 7th and 8th congressional districts. Further, as Judge Titus wrote in his concurring opinion in *Fletcher*, the *Fletcher* plaintiffs "premised their claim of political gerrymandering on allegedly improper racial motivations." *Id.* at 905. In contrast, the present case does not allege any such improper racial motivations. As a result the Court is unconvinced by Defendants' argument that there is an identity of the cause of action in both this case and Fletcher.

In addition, the Court is not convinced by Defendants' claim that the *Fletcher* plaintiffs virtually represented the *Benisek* Plaintiffs. Indeed, Defend-

ants' argument, in this respect, is that the "*Fletcher* plaintiffs had exactly the same interest as the *Benisek* Plaintiffs: throwing out the plan of redistricting and drawing a new one." (ECF No. 13-2 at 11.) However, even if the Court were to credit Defendants' assertion, the doctrine of virtual representation requires more in this Circuit. Indeed, "the doctrine of virtual representation does not authorize application of a bar to relitigation of a claim by a nonparty to the original judgment where the parties to the first suit are not accountable to the nonparties who file a subsequent suit." *Martin*, 407 F.3d at 651. Here, Defendants have not shown the Court how the *Fletcher* plaintiffs were accountable to the *Benisek* Plaintiffs.

Defendants appear to argue that because the *Fletcher* Court gave its tacit approval to the plaintiffs in that case to act as a virtual representative of "all who claimed to be aggrieved by the [redistricting] plan," they, in fact, served as virtual representatives of the *Benisek* Plaintiffs. However, while the tacit approval requirement is necessary to establish virtual representation, it is not sufficient. *Id.* ("In addition, a party acting as a virtual representative for a nonparty must do so with at least the tacit approval of the court.") (emphasis added). Defendants have failed to show that the *Fletcher* plaintiffs were accountable to the *Benisek* Plaintiffs—an independent prerequisite—and therefore have failed to persuade the Court of their virtual representation claim.

Therefore, the Court does not find that Plaintiffs' claims are barred by *res judicata*. Ultimately, however, the Court will grant Defendants' motion on dismiss on other grounds.

B. Plaintiffs' claim under Article I, Section 2 and the Fourteenth Amendment of the United States Constitution

Plaintiffs' first claim is "that the structure and composition of the 4th, 6th, 7th, and 8th [congressional] districts constitute impermissible abridgment of representational and voting rights guaranteed under Article I, Section 2 and the 14th Amendment Sections 1 & 2." (ECF No. 18 at 28.) This claim is not one that is justiciable and therefore must be dismissed.

The courts have long struggled with their role in policing the drawing of districting maps by state legislatures. Indeed, the Constitution appears to entrust the responsibility of overseeing state legislatures in this regard primarily to Congress. Article I, Section 4 gives "state legislatures the initial power to draw districts for federal elections, [but] permits Congress to 'make or alter' those districts if it wish[es]." *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2010) (plurality opinion) (quoting U.S. Const. art I, § 4). However, since *Baker v. Carr*, 369 U.S. 186 (1962), Courts have "consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts," giving rise to the formulation of the "one person, one vote" rule. *Davis v. Bandemer*, 478 U.S. 109, 118 (1986) (plurality opinion), rev'd on other grounds, 541 U.S. 267 (2010); *Reynolds v. Sims*, 377 U.S. 533, 557-661 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). Further, even where there are no population inequalities among districts, courts have "reviewed, and on occasion rejected, districting plans that unconstitutionally diminished the effectiveness of the

votes of racial minorities." *Bandemer*, 478 U.S. at 199 (collecting cases).

However, here, Plaintiffs make neither an unequal population claim nor a racial discrimination claim. Rather, Plaintiffs' claim is that because the 4th, 6th, 7th, and 8th congressional districts are composed of "de facto non-contiguous" segments, the voters in those districts—particularly those in the smaller segment of the district—are marginalized in that they enjoy decreased quality of representation and suffer a harm akin to vote dilution. (ECF No. 1 at 29.) Theirs is, in essence, a claim of political gerrymandering.

In *Davis v. Bandemer*, the Supreme Court further expanded the judiciary's role in overseeing the districting process. It ruled that political gerrymandering claims—or, as the Court phrased it, "claim[s] that each political group in a State should have the same chance to elect representatives of its choice as any other political group"—were justiciable. *Id.* at 124. The Court went on to explain that where unconstitutional vote dilution is alleged with regard to an individual district, courts should focus their inquiry "on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate." *Id.* at 133.

However, the *Bandemer* standard faced harsh criticism from its inception. In her dissenting opinion, Justice O'Connor noted that the *Bandemer* opinion implicitly endorsed "some use of simple proportionality as the standard for measuring the normal representational entitlements of a political party."

"[T]he plurality opinion," she continued, "ultimately rests on a political preference for proportionality—not an outright claim that proportional results are required, but a conviction that the greater the departure from proportionality, the more suspect an apportionment becomes." *Id.* at 158. The plurality's standard, she predicted, "will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality." *Id.* at 155.

Eighteen years later, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Supreme Court, endorsing Justice O'Connor's dissent, reversed *Bandemer*. Indeed, the Court found that:

> Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerg. ed. Lacking them, we must conclude that gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

Id. at 281.

In so holding, the Court distinguished political gerrymandering claims from claims involving districts of unequal population. It expressly stated that the one-person, one-vote standard had "no bearing upon this question [of political gerrymandering], neither in principle nor in practicality" *Id.* at 290. With regard to principle, echoing Justice O'Connor's dissent in *Bandemer*, the Court explained that "to say that each individual must have an equal say in the selection of representatives, and hence that a majori-

ty of individuals must have a majority say, is not at all to say that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers." *Id.* The Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups." *Id.* at 288.

And, with regard to practicality, the Court noted that:

> the easily administrable [one-person, one-vote] standard of population equality adopted by *Wesberry* and *Reynolds* enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.

Id. at 290.

The Court in *Vieth* also highlighted the contrast between *political* gerrymandering claims and *racial* gerrymandering claims. On the one hand, "[t]he Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics." *Id.* at 285. On the other hand, "the purpose of segregating voters on the basis of race is not a lawful one." *Id.* at 286. While "[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the

Equal Protection Clause, a similar purpose to discriminate on the basis of politics does not." *Id.* at 293. In rejecting a proposed test for political gerrymandering loosely based on racial discrimination cases applying § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the Court explained:

> A person's politics is rarely as discernible—and never as permanently discernible—as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally craft a remedy.

Vieth, 541 U.S. at 287.

Although the holding in *Vieth* was that the political gerrymandering claim advanced there was not justiciable, in a concurring opinion, Justice Kennedy, who provided the *Vieth* plurality with the crucial fifth vote, did leave open the door to judicial relief in future cases "if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 306 (Kennedy, J., concurring). In *League of United Latin American Citizens (LULAC) v. Perry*, 584 U.S. 399 (2006), the Court explained that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id.* at 418. Nonethe-

less, this reliable standard—described in *Baker* as a "judicially discoverable and manageable standard[]"—has proved elusive. 369 U.S. at 217. As this Court noted in *Fletcher*, "all of the lower courts to apply the Supreme Court's *Vieth* and *LULAC* decisions have rejected" parties' proposed standards. *Fletcher*, 831 F. Supp. 2d at 904; *see also Radogno v. Illinois State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5868225 (N.D. Ill. Nov. 22, 2011) (reviewing seven standards the Supreme Court has rejected).

In the case at bar, Plaintiffs urge the Court to recognize that "constitutionally adequate representation must consist of more than just equal population," and they offer a "standard for judging whether minimal representational rights are afforded or abridged within the smaller segments of the 4th, 6th, 7th, and 8th districts." (Am. Compl. at ¶¶ 17, 3.) Specifically, Plaintiffs contend that "the presence of either (1) geographic or (2) demographic/political contiguity—i.e., real or de-facto contiguity or similarity in the demographic/partisan composition of non-contiguous (including essentially or de-facto non-contiguous) segments—" is required by Article I, Section 2 and the Fourteenth Amendment of the Constitution.

However, the standard Plaintiffs propose is, in substance, markedly similar to tests that have already been rejected by the courts. Indeed, Justice Kennedy in his concurring opinion in *Vieth* specifically observed that "even those criteria that might seem promising at the outset (e.g., continuity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise politi-

cal neutrality when used as the basis for relief." *Vieth*, 541 U.S. at 308-09; *see also* M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 Pol. Geography 989, 1000-1006 (1998) (explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions). And, as this Court pointed out in *Fletcher*, the Supreme Court has made clear that "[t]he Constitution does not mandate regularity of district shape." *Fletcher*, 831 F. Supp. 2d at 903 (quoting *Bush v. Vera*, 517 U.S 952, 962 (1996)).

The Court is not insensitive to Plaintiffs' contention that Maryland's districts as they are currently drawn work an unfairness to Republicans.[4] Referring to Maryland's third congressional district, Judge Niemeyer despaired that "the original Massachusetts Gerrymander looks tame by comparison, as this is more reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Id.* at 902 n.5. Further, although "Maryland's Republican Party regularly receives 40% of the statewide vote [it] might well retain only 12.5% of the congressional seats." *Id.* at 903.

---

[4] In other states, where Republicans control the state legislature, Democrats contend that they are unjustly disadvantaged by the layout of congressional districts. *See, e.g.*, Suzy Khimm, Don't Mess with Texas Democrats, Mother Jones, Sept./Oct. 2010, http://www.motherjones.com/politics/2010/08/matt-angle-texas-redistricting ("The Texas Republican [Tom DeLay], known as 'The Hammer,' had orchestrated a Machiavellian scheme to redraw the state's congressional districts and banish Democrats from power. In 2004, [U.S. Representative] Martin Frost was one of the four Texas Dems in the House picked off as a result.")

It may well be that the 4th, 6th, 7th, and 8th congressional districts, which are at issue in this case fail to provide "fair and effective representation for all citizens." *Reynolds*, 377 U.S. at 565-68. However, as the Supreme Court has made clear in *Vieth* and *LULAC*, this Court lacks "judicially discoverable and manageable standards for resolving" Plaintiffs' claim. *Vieth*, 541 U.S. at 277-281 (quoting *Baker*, 369 U.S. at 217); *see also LULAC*, 548 U.S. at 423. As a result, it is a nonjusticiable political question. The power to address Plaintiffs' concerns thus lies not with the judiciary but rather with the State of Maryland and the United States Congress. See United States Constitution art. I, § 4. Plaintiffs' claim must therefore be dismissed.

C. Plaintiffs' First Amendment Claim

Plaintiffs' second claim is that the structure and composition of the 4th, 6th, 7th, and 8th congressional districts infringe upon their First Amendment rights of political association. (Am. Compl. at ¶ 5.) As Plaintiffs explain, "[m]uch of our contention here rests on the impact on Republican voters, due to their party affiliation, resulting from the intentional structure and composition of the challenged districts and which is aggravated by the operation of Maryland's closed primary election system." (ECF No. 18 at 41.)

However, just as in *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections*, 781 F. Supp. 394, 401 (D. Md. 1991) and *Duckworth*, 213 F. Supp. 2d at 557-58, "nothing [about the congressional districts at issue in this case] affects in any proscribed way [P]laintiffs' ability to participate in the political debate in any of the Maryland congressional districts in

which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives."

Further, as the Fourth Circuit ruled in *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981), "to the extent [the First Amendment] protects the voting rights here asserted their protections do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments [sic]."

Accordingly, Plaintiffs' claim under the First Amendment is not one for which relief can be granted, and it must therefore be dismissed.

IV. CONCLUSION

The Court therefore GRANTS Defendants' motion to dismiss (ECF No. 13) without referring the present matter to a three-judge panel.

APPENDIX C

FILED: November 12, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1417

(1:13-cv-03233-JKB)

O. John Benisek; Stephen M. Shapiro;
Maria B. Pycha,

Plaintiffs-Appellants,

v.

Bobbie S. Mack, Chairman; Linda H. Lamone,

Defendants-Appellees.

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge King, and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

Maryland 2011 Congressional Districts

Senate Bill 1

October 20, 2011